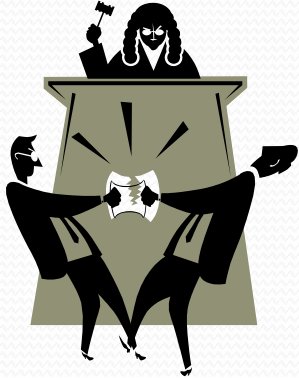


Working With Tribes and the Regulatory Program

- National Historic Preservation Act, 36 CFR 800, and Appendix C – Working Within the Law and Policy Guidance

High Level Observations



One of the most visible and controversial Corps programs

Charged with balancing environmental protection with sustainable development



Decisions based on best professional judgment



Regulatory Program Overview- Goals

Provide strong protection of the Nation's aquatic environment, including wetlands



Enhance the efficiency of the Corps Administration of its program

Ensure that the Corps provides the regulated public with fair and reasonable decisions



Authorities

Construction and dredging
Section 10 Rivers and Harbors
Act (RHA)



Discharge of dredged and fill material
Section 404 Clean Water Act (CWA)



Transport and discharge of dredged
material
Section 103 Ocean Dumping Act (ODA)

Army's Regulatory Program Goal

- The Regulatory Program strives to be fair, flexible, and efficient, providing technical assistance to the public, objective project evaluations, and timely permit decisions. Environmental restoration and protection responsibilities are achieved by working with applicants to produce permittable projects and by implementing the least environmentally damaging practicable alternative, and by avoiding and minimizing impacts to aquatic resources.

More Regulatory Program Challenges

Regulatory Influences = Policy Tension

Goals

- Timeliness
- Predictability
- Consistency
- Transparency
- Cost Effective

Influences

- Workload Increases
- Budget Flat / Inflation Pace
- Interagency Coordination Requirements
- Retirements / Recruitments

Annual Program Facts

- ~100,000 written authorizations affecting waters of the U.S., including wetlands
 - 75% in private property
 - Property under control of other agencies, NGOs
 - Tribal lands
- ~110,000 jurisdictional determinations
- ~ 2000 enforcement cases
- ~ 60 appeals cases (denials, JDs)



Regulatory Program Principles

- District Engineers make permit decisions
- Strive for fair, flexible, timely, and efficient permit decisions
- Spectrum of small-routine to large-highly visible, complex or controversial projects
- Balanced, transparent, multi-perspective, and timely permit evaluations constitute sound public service
- Integrate consultation requirements with Regulatory timeframes and OMB-established performance standards

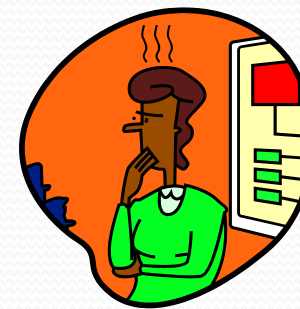
CUSTOMER SERVICE FOCUS!!

Players & How they “Play”

CWA	Regulate WOUS/Wetlands
Congress	Enacted CWA
Courts	SWANCC, Rapanos, 402/404 cases, NEPA & Scope
Regulated Community	Customer Service – Fair, Objective, Predictable Decisions
Interested Parties	<ul style="list-style-type: none">■ Resource Protection■ Facilitate Development
Corps	Asserts Jurisdiction; Fair, Timely, Balanced Decisions
EPA	Shares CWA, Civiletti, 404 q/c
FWS, NMFS, ACHP	Narrowly focused on resource protection
States	Related Regulations – 401 & CZM certifications

Regulatory Challenges

- Regional variations in aquatic ecosystems, climatic regimes, cultural fabrics, economies, development pressures all affect program consistency, fairness and predictability
- Designating where jurisdictional waters begin and end is far from obvious – not a precise science
- What constitutes a significant nexus for headwater aquatic resources?
- Other controversial issues tied to jurisdiction: property rights, wetland “values”, environmental conservation vs. preservation



2012 NWP Reauthorization Schedule

- ✓ March 2010 – Received and analyzed NWP suggestions from Districts
- ✓ July 2010 – Completed draft proposed NWPs
- ✓ September 2010 – Provide draft proposed NWPs to OMB for interagency review under EO 12866
- January 2011
 - Publish proposed NWPs in *Federal Register* for 60-day comment period
 - Provide draft national decision documents for public comment, concurrent with FR notice
 - Initiate programmatic Section 7 Endangered Species Act consultation with FWS and NOAA
 - Districts initiate government-to-government consultation with Tribes
- April 2011 – Convene team of Regulatory staff to review comments, identify necessary changes, and draft responses to comments and text of the final NWPs

2012 NWP Reauthorization Schedule

- July 2011 – Brief ASA(CW) on draft final NWPs
- August 2011
 - Submit draft final NWPs to OMB for interagency review under EO 12866
 - Prepare the final national decision documents for each NWP
- December 2011
 - Publish final NWPs in *Federal Register*
 - States, Tribes, and EPA get 90 days to make WQC decisions
 - States get 90 days to make CZMA consistency determinations
 - Districts prepare supplemental decision documents to support regional conditions for Division Commander approval
- March 2012
 - NWPs go into effect on or before 18 March 2012

Focus of the Proposed 2012 NWP's

- Maintain Consistency Across NWP's
- Enhanced Protection for Streams and Open Waters
- Maintain Regulatory Program Efficiency
- Enhance relationships
 - Indian Tribes; G2G Consultation and 401 WQC
 - States; 401 WQC and CZMA Consistency Determinations

Tribal Issues w/Regulatory Program

- Scope of Analysis/Permit Area/Undertaking
- Private Lands and Federal Permit
- Extent of Trust responsibility for non-Corps activities
- Permits on Tribal Lands
- Time frames for commenting on Public Notices or responding to letters perceived as insufficient
- Appendix C – developed in 1990; out of date, inconsistent with 36 CFR 800, no role for Tribes. Interim guidance is a stop gap measure
- NWPs – reduced comment period, some NWPs are non-reporting, “so how can we comply with Federal statutes?”
 - Minimal effects
 - Local procedures
 - Programmatic consultation

Undertaking

- From 36 CFR 800.16: “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency, those carried out with Federal financial assistance, those requiring a Federal permit, license or approval and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal Agency
- DE’s determine whether a potential project, activity, or program meets the definition of an undertaking
- If not, the historic preservation review process is complete and the administrative record should document this
- In the context of the Corps Regulatory Program the undertaking is the structure or fill (activity) requiring a DA permit, that is, the discharge of dredged or fill material into waters of the United States, plus a reasonable upland buffer area

No Universal Scope of Analysis Rule

- Each project analyzed on its specific facts, case-by-case considering:
 - How much cumulative federal control/responsibility?
 - Do the regulated activities comprise a substantial portion of the project
 - How much entire project is within Corps jurisdiction
 - Does the independent utility test apply to project phases?
 - Is the regulated activity a link in corridor-type project
 - Does the upland aspects directly affect the location and configuration of the regulated activity?

When to Consider “*Expanded*” NEPA Scope of Analysis

- When no development could occur in uplands without a 10/404 permit
- When construction of the overall project is dictated by the inextricable interconnectedness of activities within and outside of jurisdictional waters
 - Lines on graph paper
 - Like capillaries
 - Braided throughout

No Universal Scope of Analysis Rule

Each project analyzed on its specific facts, case-by-case, considering:

- How much cumulative federal control / responsibility?
- Do the regulated activities comprise a substantial portion of the project?
- How much of entire project is within Corps jurisdiction?
- Does the independent utility test apply to project phases?
- Is the regulated activity a link in corridor-type project?
- Does the upland aspects directly affect the location and configuration of the regulated

Appendix C and 36 CFR 800

Appendix C

- Definition of Undertaking limited to aquatic resources/buffer
- Permit Area
- Limited Federal Handle
- Time Frames for consultation

36 CFR 800

- Definition of Undertaking unlimited
- Area of Potential Effects
- Potentially broader scope of analysis
- No Time Frames for consultation

Permit Area and 106 APE

SPs

Broader Federal Handle – Potentially More Than Minimal Effects

Project
Footprint

NHL →



- **App B Permit Area = WOUS + Upland buffers (determined by DE)**
- **App B provide flexibility to expand the permit area proportional to the impacts**
- **For SPs (in general) permit area = project footprint, and may go beyond**
- **Corps will consider effects to historic properties within the permit area**
- **106 APE = App B Permit Area = SP permit area**

----- SP Permit Area
----- Project Footprint

Permit Area and 106 APE

GPs

Limited Federal Handle – Minimal Effects

NHE

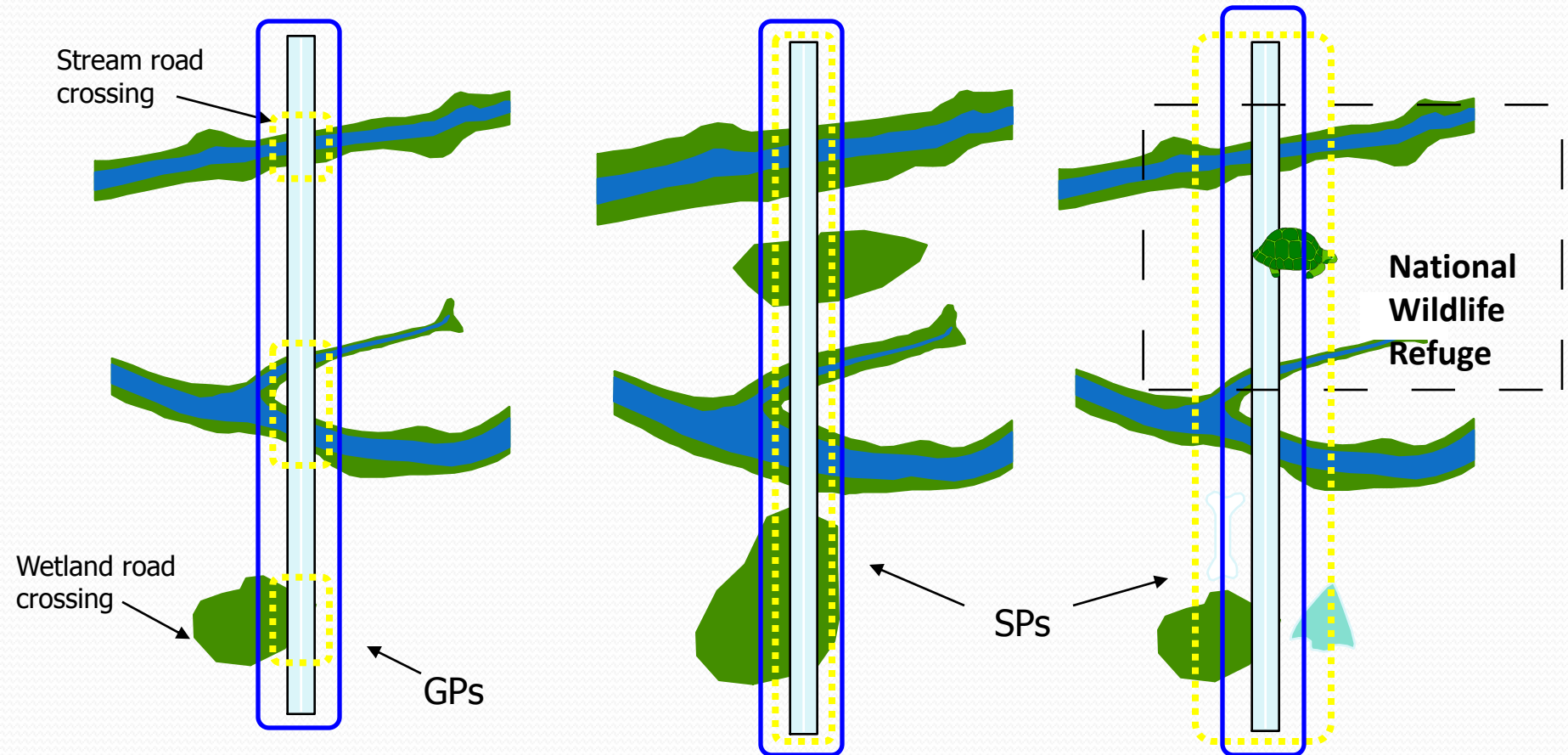


- **App B Permit Area = WOUS + Upland buffers (determined by DE)**
- **Corps will only consider effects to historic properties within the GP permit area**
- **106 APE = App B Permit Area = GP Permit Area**

- **GP Permit Area**
- **Project Footprint**

Permit Area and 106 APE

Corps Proposal – Linear Projects – Federal Handle Varies



- App B provide flexibility to expand the permit area proportional to the impacts

..... Permit Area = 106 APE
—— Project Footprint

Policy Initiatives Affecting Indian Nations

- Clean Water Act jurisdiction guidance and rulemaking
- Definition of Fill revision through rulemaking
- Waste Treatment Exclusion guidance and rulemaking
- NWP 2012
- Suspension of NWP 21
- Cumulative Effects issues and guidance
- Appendix C

Hot Issues

- Clean Water Act Jurisdiction post-SWANCC & *Rapanos* decisions by Supreme Court
- Reissue revised and new Nationwide Permits 2012 thru rulemaking
- Increasing Regulatory Program workload and complexity of work (jurisdictional issues, ESA, 106, NEPA scope)
- Litigation
- Watershed focus, adaptive management, climate change & sea level rise
- Program Resources – flat budget, too few staff, graying of organization and institutional memory loss

Words to the Wise

- Help the Corps integrate 10 & 404 regulatory process with those of other federal, tribal, state agencies to avoid sequential reviews and redundant activities
- Applicants should coordinate early so the “*Purpose & Need Statement*” can be agreed upon, appropriate “*Alternatives Analyses*” conducted and documented --- **BEFORE** project designs are locked in
- Remember, the Corps needs a “complete” application to make a final permit decision
- Take advantage of pre-application consultation process
- Remember, Department of the Army permits are usually conditioned to be good only after applicants also comply with NHPA-106, ESA, CZMA, etc.

Questions?



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